Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1995

JEANNETTE G. GARFIELD, *et al.*,

Petitioners,

v.

J.C. NICHOLS REAL ESTATE, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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47 pp

QUESTIONS PRESENTED

1. Whether the 90-day limitations period set out in § 115 of the Civil Rights Act of 1991 should properly apply to preclude the filing of federal age discrimination actions accruing prior to enactment, particularly where application of the limitations period would contravene both the settled expectations of the parties and the desired effect of the amended law to advance age claims on their merits.

2. Whether a joint stipulation of dismissal *without prejudice* filed after a 90-day statute of limitations has run can be the basis for an effective dismissal of the action *with prejudice* pursuant to Fed. R. Civ. P. 41(a)(1)(ii), 28 U.S.C.A.

LIST OF PARTIES

Plaintiffs-Appellants below were Jeannette G. Garfield, Rosemary Hornbeck, Thomas Heller, Donna J. Klammer and Ellen A McCarthy. Defendants-Appellees below were J.C. Nichols Real Estate, a common joint venture partnership, J.C. Nichols Realty Co., a Missouri corporation; and New Millennium of Kansas City, Inc., a Kansas corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully request that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 57 F.3d 662 (8th Cir. 1995), and is included in the Appendix at pp. 1a-12a. The decision of the district court granting the motion for summary judgment is unreported and is included in the Appendix at pp. 13a-21a.

JURISDICTION

The judgment of the court of appeals was entered on June 13, 1995. This Court has jurisdiction under 28 U.S.C. § 1254.

STATUTORY PROVISIONS INVOLVED

Prior to November 21, 1991, 29 U.S.C. § 626(e) provided as follows:

> **(e) Statute of limitations; reliance in future on administrative rulings, etc.**
>
> (1) Sections 255 and 259 of this title shall apply to actions under this chapter.
>
> (2) For the period during which the Equal Employment Opportunity Commission is attempting to effect voluntary compliance with requirements of that chapter through informal methods of conciliation, conference, and persuasion pursuant to subsection (b) of this section, the statute of limitations as provided in section 255 of this title shall be tolled, but in no event for a period in excess of one year.

29 U.S.C. § 255 provides, in pertinent part, that:

> **§ 255. Statute of limitations**
>
> . . . (a) If the cause of action accrues on or after May 14, 1947 may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action

arising out of a willful violation may be commenced within three years after the cause of action accrued . . .

The Civil Rights Act of 1991, P.L. 102-166, 105 Stat. 1079, provided, in pertinent part:

SEC. 3. PURPOSES.

The purpose of this Act are –

(1) to provide appropriate remedies for intentional discrimination and unlawful harassment in the workplace . . .

(2) to confirm statutory authority and provide statutory guidelines for the adjudication of disparate impact suits under title VII of the Civil Rights Act of 1964. . . .

SEC. 115. NOTICE OF LIMITATIONS PERIOD UNDER THE AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967.

Section 7(e) of the Age Discrimination in Employment Act of 1967 (29 U.S.C. 626(e)) is amended –

(1) by striking paragraph (2);

(2) by striking the paragraph designation in paragraph (1);

(3) by striking "Sections 6 and" and inserting "Section", and

(4) by adding at the end the following: "If a charge filed with the Commission under this Act is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought

> under this section by a person defined in section 11(a) against the respondent named in the charge within 90 days after the date of the receipt of such notice."

Section 626(e) of the ADEA after the enactment of the 1991 Civil Rights Act amendments thus provides as follows:

> **(e) Reliance on administrative rulings; notice of dismissal or termination; civil action after receipt of notice**
>
> Section 259 of this title shall apply to actions under this chapter. If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the respondent named in the charge within 90 days after the date of the receipt of such notice.

Fed. R. Civ. Proc. 41(a)(1)(ii) provides:

> **(a) Voluntary Dismissal: Effect Thereof**
>
> **(1)** ***By Plaintiff; by Stipulation,*** . . . an action may be dismissed by plaintiff . . . (ii) by filing a stipulation of dismissal signed by all parties who have appeared in the action. Unless otherwise stated in the notice of dismissal or stipulation, the dismissal is without prejudice . . .

STATEMENT AND INTRODUCTION OF THE CASE

A. Factual Background and Proceedings Before the District Court

Petitioners Jeannette Garfield, Rosemary Hornbeck, Donna Klammer, Ellen McCarthy and Thomas Heller sought recovery for damages suffered as the result of age discrimination in employment by the defendants, J.C. Nichols Real Estate, the J.C. Nichols Realty Co. and New Millennium of Kansas City, Inc. (collectively, "Nichols" or "respondents"). The petitioners were fired in April and August 1991.

Each of the petitioners alleged in their Complaints that they were more than 40 years old, that they were fired because of their age and that younger, less qualified persons were retained by Nichols. They also each alleged that Nichols' conduct in firing them and retaining younger, less qualified persons was willful, wanton and done with a complete disregard of the petitioners' interests.

Each of the petitioners filed complaints with the United States' Equal Employment Opportunity Commission. On June 19, 1992, the EEOC issued each of the petitioners a "right to sue" letter. The EEOC's letters stated, in part, that:

> The fact that the Commission will take no further action does not affect your rights to take legal action on your own behalf. *A lawsuit under the Age Discrimination in Employment Act (ADEA) ordinarily must be filed within two years of the date of the discrimination alleged in the charge.* On November 21, 1991, the ADEA was amended to eliminate this two year limit. An ADEA lawsuit may now be filed any time from 60 days after a

> charge is filed until 90 days after receipt of notice that EEOC has completed action [on] the charge. *Because it is not clear whether this amendment applies to instances of alleged discrimination* **occurring before November 21, 1991, if Charging Party decides to sue, a lawsuit should be brought within two years of the date of the alleged discrimination and within 90 days of receipt of this letter, whichever is earlier,** in order to assure the right to sue.

(Underline and bold emphasis original; italic emphasis added by petitioners.)

The 1991 Civil Rights Act went into effect on November 21, 1991, after the alleged discrimination occurred, but before petitioners filed their federal actions.

It is undisputed that each of the five petitioners filed their first Complaint against Nichols within 90 days of receiving the EEOC's right-to-sue letter; all of the complaints were filed either on July 31, 1992 or August 5, 1992. Amended Complaints for damages were filed in October 1992.

In January 1993, petitioners' and respondents' counsel discussed petitioners' desire to dismiss the actions without prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(ii). Attorney for petitioners, Louis C. Accurso, later testified by affidavit that "[a]t the time the stipulations were discussed and signed, the lead counsel for defendants, Paul Donnelly, asked affiant whether plaintiffs [petitioners] intended to refile the actions. [Accurso] informed Mr. Donnelly that he did not know but he intended to refile if the petitioners desired to do so." Respondents' counsel

did not deny the conversation, only its details. He testified by a counter-affidavit that he "asked Mr. Accurso whether he thought anyone would attempt to pursue the matter further. In posing that question, I do not recall using the words 'refile the actions' or anything that formal. Mr. Accurso responded by stating that he had 'no idea what they were going to do' or words to that effect." Respondents' counsel confirmed the conversation with Mr. Accurso in a letter dated December 30, 1993, in which he stated:

> This will confirm my understanding that you will prepare and circulate first to your clients and then to us a Stipulation(s) of Dismissal *Without Prejudice* in each of the consolidated ADEA cases now pending before Judge Sachs. The defendant has agreed to sign the Stipulation(s). Because of this action, the defendant is foregoing any of the discovery the parties were to complete by January 31, 1993.

(emphasis added).

The Stipulations for Dismissal Without Prejudice pursuant to Fed. R. Civ. P. 41(a)(1)(ii) were signed by each plaintiff, by petitioners' counsel and by David L. Heinemann, counsel for Nichols. They were filed with the district court on January 20, 1993. On January 26, 1993, Judge Sachs entered Orders dismissing the cases *without prejudice* pursuant to Fed. R. Civ. P. 41(a)(1)(ii) and adopting the parties' signed stipulations.

By way of affidavit in opposition to the summary judgment motion, petitioners' counsel testified that it was his belief (reasonably drawn from the actions, words and written stipulations of respondents' counsel) that the

respondents agreed that the dismissals were, *in fact*, without prejudice; that is, that there would be no prejudice against refiling. At no time did respondents' counsel suggest that the written stipulations be signed, renamed or reworded to indicate that the dismissals were with prejudice and could not be refiled. Indeed, respondents' counsel asked petitioners' counsel if any of the petitioners planned to pursue the matter further. As there was no other way to pursue the matter other than refiling the lawsuits, petitioners' counsel indicated that he did not know if any of the petitioners planned to refile, but he would certainly do so if his clients so requested.

Neither respondents nor their counsel nor the court expressed the belief that petitioners would – at the time of dismissal forward – be precluded from refiling the actions.

The actions were refiled seven months later, on July 28, 1993. The complaints set forth allegations essentially identical to the actions which had been dismissed without prejudice several months earlier. The complaints filed in 1992 put the defendants on notice of the exact claims made in the 1993 complaints: that petitioners were the victims of illegal age discrimination. Discovery began on the issue of whether petitioners were "employees" or "independent contractors." Prior to the filing of a Motion for Summary Judgment on November 4, 1993 (three and a half months after petitioners' refiling), there had been no discussion between counsel of a possible limitations challenge.

Respondents sought and received summary judgment on what was presented as solely a legal issue:

Whether petitioners have filed their causes of action outside the applicable state and federal limitations periods. Petitioners asserted that genuine issues of material fact remained as to whether respondents' actions were sufficiently misleading so as to estop them from asserting the defense of statute of limitation. That is, petitioners asserted that the respondents' actions of entering into a written stipulation for dismissal without prejudice at a time when (respondents later claimed) *any* dismissal would have had to have been with prejudice, was sufficiently prejudicial that defendants should be estopped from asserting that the dismissal had been *with* prejudice and could not be refiled within three years of the right-to-sue letter.

Petitioners also opposed the motion for summary judgment on the grounds that the November 1991 amendments to the Civil Rights Act (setting out the ADEA's own 90-day limitations period running from the date of the issuance of the right-to-sue letter) did not have retroactive effect. Petitioners argued that the amendments to the Civil Rights Act of 1991 did not apply to conduct that occurred before the effective date of the amendment, irrespective of whether suit was filed after the effective date of the amendments, particularly where, as here, the amendment involves limitations on assertion of substantive rights.

Lastly, petitioners suggested that if Fed. R. Civ. Proc. 41(a)(1)(ii) was to have any meaning at all, it required that if a stipulation for dismissal is filed at a time when plaintiffs are precluded from refiling, it must be designated as being *with* prejudice.

After a series of briefs were filed with the district court on the motion, the court entered an Order on May 23, 1994 dismissing the actions as untimely filed under the 90-day limitations period contained in the Civil Rights Act of 1991. Appendix, pp. 13a-21a. The District Court then entered judgments pursuant to the Memorandum and Order on June 1, 1994.

Petitioners filed their Notice of Appeal on June 27, 1994.

B. The Court of Appeals' Ruling.

The Court of Appeals for the Eighth Circuit affirmed the district court's ruling, finding that (i) the district court correctly applied the 90 day limitations period from the Civil Rights Act of 1991 in this action (App., p. 7a); (ii) respondents were not equitably estopped from asserting the actions were untimely (App., 11a); and (iii) the respondents had not by their conduct either affirmatively or impliedly waived the statute of limitations as a bar to refiling (App., p. 12a.)

REASONS FOR GRANTING THE WRIT

I. The Decision of the Court of Appeals is Erroneous and Conflicts with this Court's Directive in *Landgraf v. USI Film Products* that Lower Courts Look to the Posture of the Case and Give Effect to the Settlement Expectations of the Parties in Determining the Retroactivity and Application of a Limitations Period in ADEA Actions.

A. For actions prior to November 21, 1991, the ADEA did not have its own statute of limitations but rather incorporated by reference the limitations period set out in § 255 of the Portal-to-Portal Pay Act, 29 U.S.C. § 626(c). Generally, under the pre-1991 rule, the suit had to be commenced within two years after the cause of action accrued. 29 U.S.C. § 255(a). However, if the cause of action arose from an alleged "willful violation," the cause of action may be commenced within *three years* after the cause of action accrued. *Id.* In this action, plaintiffs have alleged that the cause of action arose from willful violations.

Section 115 of the Civil Rights Act of 1991 struck the provision that looked to the Portal-to-Portal Pay Act, and added a new self-contained statute of limitations to the ADEA:

> (e) . . . If a charge filed with the Commission under this chapter is dismissed or the proceedings of the Commission are otherwise terminated by the Commission, the Commission shall notify the person aggrieved. A civil action may be brought under this section by a person defined in section 630(a) of this title against the

> respondent named in the charge within 90 days after the date of the receipt of such notice.

29 U.S.C. § 626(e) (Supp. III 1991). Thus, under the new statutory scheme, claimants who previously had three years to file for a willful violation have only 90 days to do so.

The text of the Civil Rights Act of 1991 does not address the issue of dismissals outside the 90-day limitations period.

Nor does the text of the 1991 Act address whether it is generally to apply retroactively. Section 402(a) provides that, "[e]xcept as otherwise specifically provided, this Act and the amendments made by this Act shall take effect upon enactment." However, "[s]ince many regulatory statutes contain a compliance grace period, a provision clarifying that the Act would be immediately effective is hardly evidence of congressional intent that it be applied retroactively, particularly when Congress deleted explicit retroactivity provisions from earlier bills. At most, this effective date section creates (or preserves) an ambiguity as to whether Congress intended the Act to be generally retroactive." *Fray v. Omaha World Herald Co.*, 960 F.2d 1370, 1376 (8th Cir. 1992).

The answer to the question of the effect of § 115 of the Civil Rights Act of 1991 on actions which accrued, but were not filed, prior to the effective date of the Act is not evident from the face of the statute.

However, in *Landgraf v. USI Film Products, Inc.*, ___ U.S. ___, 114 S. Ct. 1483, 128 L.Ed.2d 229 (1994), this

Court held that, with respect to determining the retroactivity of legislation generally (and the provisions of the 1991 Civil Rights Act specifically), elementary considerations of fairness dictate that individuals should have the opportunity to know what the law is and that the settled expectations of the parties should not be lightly disrupted. The Court noted that a "statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment [citation omitted] or upsets expectations based in prior law." *Id.* at 1499. "Rather, the court must ask whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* While "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," *Id.* at 1502, the desired approach to procedural rules requires further analysis:

> Of course, the mere fact that new rule is procedural does not mean that it applies to every pending case. A new rule concerning the filing of complaints would not govern an action in which the complaint had already been properly filed under the old regime . . . *Our orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular cases* [Citations to Orders omitted.] Contrary to Justice SCALIA's suggestions, post, 114 S. Ct. at 1524-1525, we do not restrict the presumption against statutory retroactivity to cases involving "vested rights." (Neither is Justice Story's definition of retroactivity, quoted supra, at 1499, so restricted.) *Nor do we suggest*

> *that concerns about retroactivity have no application to procedural rules.*

114 S. Ct. at 1502, n. 29 (emphasis added).

Petitioners believe that the practical effect of the retroactive application of the 90-day limitation in this action unfairly precluded resolution of petitioners' age discrimination claims based on a procedural uncertainty (in part fostered by respondents' and the EEOC's ambivalent actions regarding the filing and dismissal of the complaints), all in direct opposition to the intent of the 1991 Civil Rights amendments to foster, not hinder, age discrimination suits on their merits.

Moreover, a "common sense" review of the posture of this case highlights both the unnecessary harm to petitioners and the lack of prejudice to respondents who received timely notice of petitioners' claims of age discrimination by the original filing within 90 days of the EEOC ruling. If the purpose of the 1991 amendments to the ADEA was to conform the ADEA limitations period to the Title VII limitations period, petitioners met that purpose by originally filing within 90 days of receipt of their right-to-sue letters. Moreover, it was not obvious that the dismissals had been with prejudice (as respondents *later* argued): it took respondents themselves more than three months *after petitioners' refiling* to raise the point in front of the district court.

B. Despite the lower courts' determination in this action that the focus should not be on whether the new law is substantive or procedural, and the oft-stated pronouncements from the Eighth Circuit that the 1991 amendments to the Civil Rights Act are not to be applied

retroactively, the district court, and court of appeals in affirming, sought to establish that § 115 of that Act was a procedural change which should be applied retroactively. The lower courts' emphasis should have been on the posture of this particular case and the practical effects the amendments have on the settled expectations of the parties. However, had a thorough procedural-substantive debate been engaged in by the lower courts, the conclusion should have been that the significant tightening of the limitations period affected *substantive rights* of the petitioners.

The courts at every level have held that a statute of limitations that restricts a right created by statute rather than a right at common law is deemed *a substantive* limit on the right as opposed to a mere procedural limit on the remedy. *See Sarfati v. Wood Holly Associates*, 814 F.2d 1523, 1525 (11th Cir. 1989), citing, *United States ex rel. Texas Portland Cement Co. v. McCord*, 233 U.S. 157, 162, 34 S. Ct. 550, 552, 58 L.Ed. 893 (1914); *Davis v. Mills*, 194 U.S. 451, 454, 24 S. Ct. 692, 693, 48 L.Ed. 1067 (1901); *Kozan v. Comstock*, 270 F.2d 839, 841 (8th Cir. 1959); *Bell v. Wabash Ry.*, 58 F.2d 569, 571 (8th Cir. 1932).

A proviso to the above-stated rule is that if the right created by statute is in one act and the limitations period is in another act then the limitations period is presumed not to be an integral part of the right itself. *Sarfati, supra*, 874 F.2d at 1526. However, in *Sarfati*, the court made clear that so long as the statutory section containing the limitations period and the statutory section containing the right of action are in the same congressional act, they are considered to be an integral part of the right itself and a condition on whether the right may be exercised. *Id.*

Thus, in *Sarfati,* the Eleventh Circuit rejected an argument that the limitations period discussed there was a procedural change because it was in a different section of the Interstate Land Sales Full Disclosure Act.

As in *Sarfati,* in this action both the new 90-day limitations period (§ 115) and the creation of an age discrimination action (§ 101) are contained in the same act: the Civil Rights Act of 1991. Indeed, 29 U.S.C. § 626(e) as amended by the 1991 Act no longer incorporates a statute of limitations period from the Portal-to-Portal Pay Act, 29 U.S.C. § 255. Rather, it creates its own limitations period and sets it out within the confines of the ADEA. The change is substantive, and should not be applied retroactively.

C. Fed. R. Civ. P. 41(a)(1)(ii) definitively states that "*[u]nless otherwise stated in the notice of dismissal or stipulation,* the dismissal is *without* prejudice." The requirement that a stipulation be filed in court "is not merely a technicality." *McCall-Bey v. Franzen,* 777 F.2d 1178, 1185 (7th Cir. 1985). Requiring that parties file a stipulation of dismissal with the court serves important goals of judicial and administrative efficiency. *Camacho v. Mancuso,* 53 F.3d 48, 51-52 (4th Cir. 1995). In cases where the stipulated dismissal is with prejudice, the entry of the date of the voluntary dismissal on the docket aids the application of res judicata should future litigation arise out of the same transaction. *McCall-Bey, supra.*

The effect of not treating a signed stipulation for dismissal without prejudice as being with prejudice runs counter to not only the letter of Rule 41, but also its intent to not dismiss cases with prejudice unless the intent that

the dismissal be with prejudice is clear from the stipulation or notice.

Thus, petitioners' signatures on the Stipulations for Dismissal Without Prejudice were ineffective as Dismissals With Prejudice under Rule 41(a)(1)(ii).

In refusing to look at the settled expectations of the parties and the *full* posture of this particular case, including the *underlying* legislative purpose of advancing the adjudication of ADEA cases on their merits (rather than on the ritual application of a confusing limitations period), and in refusing to give effect to the procedural safeguards of Rule 41(a)(1)(ii), the court of appeals erred.

II. The Question Presented is Important

The court of appeals' ruling had the effect of negating Congress' intent to see that claims of illegal age discrimination in the workplace are determined on their merits and not as the result of procedural uncertainties. The Eighth Circuit's opinion failed to discuss the legislative history which noted Congress' intent that remedial statutes, such as civil rights laws, should be broadly construed to further the underlying congressional purpose of the law, which is to "provide appropriate remedies for intentional discrimination . . . in the workplace." See P.L. 102-166, 105 Stat. 1071 § 3(1) [stating purpose]; H.R. Rep. No. 40(II), 102nd Cong., 1st Sess. 96 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 727-28 (House Judiciary Comm. Report).

The Act states that among its three general purposes is that "legislation is necessary to provide additional

protections against unlawful discrimination to employment." P.L. 102-166, Sec. 2(3); 105 Stat. 1071.

The legislative history of § 115 suggests that the specific purpose of that section was to further the need to have legislation that provided additional protections against the unlawful discrimination in employment, specifically by trying to eliminate differences between Title VII and ADEA charge-filing and litigation limitations provisions. *See* House Report No. 102-40(T), 102nd Cong., 1st Sess. 96 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 634. The underlying need to eliminate the differences was that "many age discrimination victims lost their rights to go to court because they were unaware of the ADEA's time limitations for filing a lawsuit, and received no notice from the EEOC that they could – in fact, must – file suit by certain dates. These differences between Title VII and the ADEA have resulted in confusion, which may be exacerbated by the changes made in section 205 of this Act." *Id.*

Thus, the report from the House of Representatives makes it clear that the purpose of the establishment of the 90-day limitation was to solve the aforementioned problems by eliminating the practice of calculating the time limits without reference to the EEOC proceedings, and not solely to shorten the time for filing suit for policy reasons. It is not that the prior time limitations for filing ADEA suits was unfair or unjust to employers, but rather that the Congress and the President believed that more, not less, victims of age discrimination would be allowed to assert their claims if the amendments were made. *Id.; see also Simmons v. Al Smith Buick Co., Inc.*, 841 F.Supp. 168, 170 (E.D.N.C. 1993) ("to read § [1]15 as requiring the

dismissal of an action brought within the two-year statute of limitations would directly oppose the purpose of the amendment. Further, a dismissal on those grounds would contravene the policy of the ADEA as a whole, as it is to be liberally interpreted to accomplish its stated purpose of ending age discrimination in employment").

Without further direction from the Court, the lower courts will continue to apply the 90-day limitations in situations in which mechanical application runs counter to, instead of in furtherance of, the stated goal of Congress to have these actions tried on their merits.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 94-2658

Jeanette G. Garfield,

Plaintiff-Appellant,

v.

J. C. Nichols Real Estate, a common joint venture partnership; J. C. Nichols Realty Co., a Missouri Corporation; New Millennium of of [sic] Kansas City, Inc., a Kansas Corporation,

Defendants-Appellees.

Rosemary Hornbeck, Thomas Heller, Donna J. Klammer, Ellen A. McCarthy,

Plaintiffs-Appellants,

v.

J. C. Nichols Real Estate, a common joint venture partnership; J. C. Nichols Realty Co., a Missouri Corporation; New Millennium of of [sic] Kansas City, Inc., a Kansas Corporation,

Defendants-Appellees.

* Appeals from the United States District Court for the Western District of Missouri.

Submitted: January 9, 1995

Filed: June 13, 1995

Before HANSEN, Circuit Judge, FLOYD R. GIBSON, Senior Circuit Judge, and WILL, Senior District Judge.*

HANSEN, Circuit Judge.

The plaintiffs appeal the district court's[1] order granting summary judgment against them on their age discrimination claims under the Age Discrimination in Employment Act and the Missouri Human Rights Act. The plaintiffs assert that the district court erred in applying the statute of limitations from the 1991 Civil Rights Act to their cases, which were based on conduct occurring before that Act became effective. The plaintiffs also argue that even if the district court applied the correct limitation period, the district court erred in holding that the defendants are not prohibited, under the doctrines of equitable estoppel and waiver, from asserting that the limitation period bars the plaintiffs' claim. We affirm.

I.

The vast majority of the facts relevant to this appeal are not in dispute. The plaintiffs were real estate agents for the defendants until the plaintiffs were terminated in

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* The HONORABLE HUBERT L. WILL, Senior United States District Judge for the Northern District of Illinois.

[1] The Honorable Howard F. Sachs, Senior United States District Judge for the Western District of Missouri.

April and August of 1991. All of the plaintiffs were older than 40 when they were terminated. Each of the plaintiffs filed an individual age discrimination charge with the Equal Employment Opportunity Commission (EEOC) and the Missouri Commission on Human Rights (MCHR). On June 19, 1992, the EEOC issued each of the plaintiffs a right-to-sue letter. The right-to-sue letter contained the following statement:

> The fact that the Commission will take no further action does not affect your rights to take legal action on your own behalf. A lawsuit under the Age Discrimination in Employment Act (ADEA) ordinarily must be filed within two years of the date of discrimination alleged in the charge. On November 21, 1991, the ADEA was amended to eliminate this two year limit. An ADEA lawsuit may now be filed any time from 60 days after a charge is filed until 90 days after receipt of notice that EEOC has completed action [on] the charge. Because it is not clear whether this amendment applies to instances of alleged discrimination **occurring before November 21, 1991, if Charging Party decides to sue, a lawsuit should be brought within two years of the date of the alleged discrimination and within 90 days of receipt of this letter,** ***whichever is earlier,*** in order to assure the right to sue.

(Jt. App. at 51.)

Each of the plaintiffs followed the EEOC's advice and filed his or her complaint in the United States District Court for the Western District of Missouri in late July or early August 1992, well within two years of the date of the alleged discrimination and also well within 90 days of

receiving the EEOC's right to sue letter. The parties to these suits stipulated to a consolidation of the cases for the purposes of discovery and pretrial proceedings.

In December 1992 or early January 1993, the plaintiffs' counsel approached the defendants' counsel about the possibility of filing a stipulation to dismiss the suits without prejudice. During the course of the conversations, counsel for the defendants asked if the plaintiffs intended to pursue the matter any further or to refile the actions. Counsel for the plaintiffs recalls answering that he did not know if the suits would be refiled, but he would do so if the plaintiffs requested that he do so. The defendants nevertheless agreed to stipulate to a dismissal without prejudice, and the district court dismissed the cases without prejudice on January 26, 1993.

The plaintiffs refiled their cases on July 28, 1993, seven months after the dismissal without prejudice. The issues raised in the new complaints were nearly identical to the issues in the cases dismissed without prejudice. On November 4, 1993, the defendants filed a motion for summary judgment alleging, among other things, that the plaintiffs' age discrimination actions were untimely under the limitation period prescribed by the 1991 Civil Rights Act because the plaintiffs had not filed the cases within 90 days of the date the EEOC issued its right to sue letter.

The district court agreed that the 90-day limitation period from the 1991 Civil Rights Act governed the case and that the plaintiffs' actions were untimely because they had not been filed within that 90-day period. In reaching that conclusion, the district court rejected the

plaintiffs' contention that the defendants were equitably estopped from asserting that the actions were untimely, and rejected their alternative argument that the defendants had waived the right to assert the statute of limitations defense. The plaintiffs appeal.

II.

The plaintiffs argue that the district court should have applied the statute of limitations in effect under the ADEA prior to the enactment of the Civil Rights Act of 1991. Under the rules in place prior to the Civil Rights Act of 1991, a plaintiff in an age discrimination case generally had two years after the action accrued to file a claim, and three years if the claim alleged a "willful violation." 29 U.S.C.A. § 626(e) (incorporating limitation periods from the Portal-to-Portal Pay Act, 29 U.S.C. § 255(a)) (superseded 1991). The plaintiffs argue that they alleged a "wilful violation" of the ADEA and that the three-year limitation period applied. Thus, they contend that the refiling of their actions in July 1993 was well within the three-year period given that their claims accrued when they were terminated in April and August of 1991.

The defendants argue that the district court properly applied the 90-day limitation period found in section 115 of the Civil Rights Act of 1991. Pub. L. 102-166, 105 Stat. 1079 (codified at 29 U.S.C.A. § 626(e) (Supp. 1995)). This "new" statute of limitations requires the plaintiff to bring a suit under the ADEA within 90 days after receiving notice that the administrative proceeding has terminated. *Id.* The plaintiffs contend that the 90-day limitation

period cannot be applied "retroactively" to cases that accrued before the Civil Rights Act of 1991 took effect. While the plaintiffs acknowledge that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity," *Landgraf v. USI Film Prod., Inc.* 114 S. Ct. 1483, 1502 (1994), the plaintiffs contend that we should treat the statute of limitations in this case as a substantive limit on their case instead of a mere procedural limit on the remedy.

We very recently rejected the substance of plaintiffs' argument when we noted that the limitation period from the Civil Rights Act of 1991 applies to cases filed after November 21, 1991, the effective date of the new limitation period, even if the claim accrued before that date. *Anderson v. Unisys Corp.*, ___ F.3d ___, 1995 WL 231451, at *2, n.1 (8th Cir. Apr. 19, 1995). We expressed doubt that the statute could be considered "retroactive" in such a case. *Id.* Moreover, we noted that even if the application of the statute of limitations could be considered retroactive, we have previously held that the ADEA statute of limitations is "a procedural rather than a substantive requirement" and that " 'courts apply the procedure in effect when the case is before them.' " *Id.* (quoting *United States v. Higgins*, 987 F.2d 543, 546 (8th Cir. 1993)).[2]

The plaintiffs point to the Supreme Court's observations that "the mere fact that the new rule is procedural does not mean that it applies to every pending case" and

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[2] This conclusion is also consistent with the only other circuit court to address this issue to date. *Vernon v. Cassadaga Valley Cent. Sch. Dist.*, 49 F.3d 886 (2d Cir. 1995).

that "[a] new rule concerning the filing of complaints would not govern an action in which the complaint already had been properly filed under the old regime." *Landgraf*, 114 S. Ct. at 1502, n.29. The plaintiffs contend that the unique posture of this case warrants that the "new" limitation period should not be applied here. We disagree. First, the plaintiffs' case was not a "pending case" that was affected by the new rule. The plaintiffs refiled their complaint well after the Civil Rights Act of 1991 took effect. As we pointed out in *Anderson*, in those circumstances, the application of the statute of limitations is not "retroactive." ___ F.3d at ___, 1995 WL 231451, at *2, n.1. Moreover, we see nothing unique about the "posture" of this case that would require us to depart from the general rule that the courts apply the procedural rules in effect at the time to the cases before them. Accordingly, we conclude that the district court correctly applied the 90-day limitation period from the Civil Rights Act of 1991 in this case.

III.

The plaintiffs next argue that even if the 90-day limitation applies, the district court erred in finding that the defendants were not equitably estopped from asserting the limitation as a defense in this case. The plaintiffs argue that under Missouri law, a party can be equitably estopped from asserting a statute of limitations where the party seeking to assert the limitation has in any way prevented the other party from filing the lawsuit.

Missouri law is inapplicable on questions of estoppel and tolling in cases where a federal claim is at issue and

there is a federal statute of limitations for that claim. *See Victor Foods, Inc. v. Crossroads Economic Dev. of St. Charles County, Inc.*, 977 F.2d 1224, 1227 (8th Cir. 1992) ("state tolling and savings provisions do not apply when Congress has provided a federal statute of limitation for a federal claim"). We will thus treat the plaintiffs' equitable estoppel arguments under the appropriate federal standards. In ADEA and Title VII cases:

> "The statute of limitations will not be tolled on the basis of equitable estoppel unless the employee's failure to file in a timely fashion is the consequence either of a deliberate design by the employer or of actions that the employer should unmistakably have understood would cause the employee to delay filing his charge."

Kriegesmann v. Barry-Wehmiller Co., 739 F.2d 357, 358-59 (8th Cir. 1984) (ADEA case) (quoting *Price v. Litton Business Sys., Inc.*, 694 F.2d 963, 965 (4th Cir. 1982), *cert. denied*, 469 U.S. 1036 (1984)); *Hamilton v. West*, 30 F.3d 992, 994 (8th Cir. 1994) (Title VII case) (quoting same passage from *Kriegesmann*). The equitable estoppel inquiry focuses on the employer/defendants' conduct. *Hamilton*, 30 F.3d at 994.

The plaintiffs essentially argue that the defendants "should have unmistakably understood" that the defendants' agreement to the stipulated dismissal without prejudice in the context of this case would cause the plaintiffs to believe they could refile the claims without any adverse consequences from the dismissal. The plaintiffs argue that it is particularly significant that the defendants agreed to the dismissal without prejudice after the 90-day limitation period had already expired. At that

point the plaintiffs contend that the defendants either knew the dismissal without prejudice would bar the refiling of the claim and failed to disclose that fact (if indeed the defendants had such an obligation – a proposition we seriously doubt), or the defendants remained silent because they believed that the dismissal without prejudice preserved the plaintiffs' right to refile without a time limitation problem. The plaintiffs also attach great significance to the fact that the defendants knew the plaintiffs would likely refile the claims. Given these facts, the plaintiffs contend that the defendants are estopped from asserting that the limitation period barred the refiled complaint. We disagree.

As the district court pointed out, the plaintiffs have failed to show any affirmative conduct by the defendants that was designed to mislead or was unmistakably likely to mislead the plaintiffs in this case. *See Smith v. City of Chicago Heights*, 951 F.2d 834, 840 (7th Cir. 1992) (equitable estoppel requires affirmative steps by the defendant which effectively prevented the plaintiff from suing within limitation period); *see also Maitland v. University of Minnesota*, 43 F.3d 357, 364 (8th Cir. 1994) (party to be estopped "must have *asserted* a fact or claim, or *made a promise*" that another party relied on) (emphasis added). None of the acts the plaintiffs have alleged constitute affirmative steps by the defendant that was designed to mislead, or was unmistakably likely to mislead, the plaintiffs in this case. First, the plaintiffs have read far too much into the defendants' agreement to the dismissal without prejudice in this case. A dismissal without prejudice does not toll a statute of limitation. *See Simons v. Southwest Petro-Chem. Inc.*, 28 F.3d 1029, 1030 (10th Cir.

1994). Indeed, its effect is just the opposite. Once a dismissal without prejudice is entered and the pending suit is dismissed, it is as if no suit had ever been filed. *Smith v. Dowden*, 47 F.3d 940, 943 (8th Cir. 1995) ("The effect of a voluntary dismissal without prejudice . . . 'is to render the proceedings a nullity and leave the parties as if the action had never been brought' ") (quoting *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 219 (8th Cir. 1977)).

Likewise, we find unpersuasive the plaintiffs' allegation that at the time of the stipulated dismissal, the defendants either knew the 90-day limitation had already expired and said nothing or believed that the plaintiffs had the right to refile. The plaintiffs are essentially arguing that either way, the defendants' silence at the time the defendants agreed to the stipulated dismissal represents affirmative conduct which gives rise to equitable estoppel. Silence, however, generally is not affirmative conduct that gives rise to a finding of equitable estoppel. *See United States v. French*, 46 F.3d 710, 714-15 (8th Cir. 1995) (government agency's silence "does not rise to the level of 'affirmative misconduct' " for estoppel purposes); *International Harvester Credit Corp. v. Leaders*, 818 F.2d 655, 659 (8th Cir. 1987) (applying Iowa equitable estoppel principles and observing that silence may be 'basis for estoppel only where there is a duty to speak); *see generally Meyers v. Asics Corp.*, 974 F.2d 1304, 1308 (Fed. Cir. 1992) ("Silence alone is not sufficient affirmative conduct to give rise to estoppel"). The plaintiffs have provided no persuasive reason for departing from this general rule.

Similarly, we conclude that the inquiry by defendants' counsel about whether the plaintiffs intended to

refile the cases is not affirmative conduct designed to cause, or conduct so unmistakably likely to cause, the plaintiff into refiling late. Even if plaintiffs' counsel specifically told the defendants' counsel that the cases might be refiled and the defendants' counsel did not object at that time, that is not sufficient evidence that defendants should have understood that plaintiffs would believe that the defendants were waiving future defenses to the refiling of the claim. *See Simons*, 28 F.3d at 1031 (equitable tolling case concluding that defendants did not actively mislead plaintiffs or lull plaintiffs into inaction by acknowledging that the plaintiffs would refile the suits after a dismissal without prejudice).

We conclude there is no evidence that defendants engaged in a "deliberate design" to mislead the plaintiffs or engaged in conduct that they should "unmistakably have understood would cause" the plaintiffs to delay refiling their charge of age discrimination. Thus, the district court committed no error in concluding that the defendants were not equitably estopped from asserting the limitation period.

IV.

The plaintiffs finally argue that the defendants, by their conduct, waived the right to assert the statute of limitations as a bar to refiling. The parties agree on the applicable standard: there is an implied waiver of a defense or a right only where a party's conduct is " 'so consistent with and indicative of an intention to relinquish [the right] and so clear and unequivocal that no other reasonable explanation of the conduct is possible.' "

Medicare Glaser Corp. v. Guardian Photo, Inc., 936 F.2d 1016, 1021 (8th Cir. 1991) (quoting *United Missouri Bank South v. Cole*, 597 S.W.2d 209, 211 (Mo. App. 1980)) (other quoted source omitted). The plaintiffs make the same arguments in favor of waiver that they made for equitable estoppel. We conclude that the defendants' conduct is neither "consistent and indicative of an intention to relinquish" the statute of limitations defense nor "so clear and unequivocal that no other reasonable explanation" is possible. Thus, the district court committed no error in finding that the defendants did not waive their right to assert the statute of limitations.

V.

The district court committed no error in concluding that the 90-day limitation from the Civil Rights Act of 1991 barred the plaintiffs' refiled age discrimination claim. According[ly], we affirm the judgment of the district court.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

JEANETTE GARFIELD, Plaintiff, v. J.C. NICHOLS REAL ESTATE, et al., Defendants.	)	No. 93-0722-CV-W-6
ROSEMARY HORNBECK, et al., Plaintiffs, v. J.C. NICHOLS REAL ESTATE, et al., Defendants.	)	No. 93-0725-CV-W-6

MEMORANDUM AND ORDER

(Filed May 27, 1994)

Before the court is the defendants' motion for summary judgment. Plaintiffs in these two consolidated cases are former agents of the defendant and have brought claims alleging violations of the Age Discrimination in Employment Act, 29 U.S.C. § 626(e) ("ADEA"), and the Missouri Human Rights Act, Mo. Rev. Stat. § 213.111. The defendants terminated the plaintiffs' contracts with the company on April 30, 1991, and August 1, 1991, and the plaintiffs filed charges of age discrimination with the Equal Employment Opportunity Commission ("EEOC")

and the Missouri Commission on Human Rights ("MCHR") in 1991. The MCHR issued right to sue letters to the plaintiffs on May 26, 1992, and the EEOC issued right to sue letters on June 19, 1992.

The plaintiffs originally filed suit against the defendants on July 31, 1992 alleging discrimination under the ADEA and MHRA. However, the plaintiffs filed stipulated dismissals of their complaints without prejudice on January 20, 1993. The plaintiffs then brought the present actions on July 28, 1993.

The first issue before the court is whether § 115 of the Civil Rights Act of 1991 ("CRA") applies retroactively to suits which accrued prior to, but were not filed until after, the statute's effective date of November 21, 1991. Prior to Congress' enactment of the CRA, the Portal-to-Portal Pay Act, 29 U.S.C. § 255, supplied the limitations period for actions brought under the ADEA. Under § 255, plaintiffs could file suit within two years from the alleged violation (or three years if the violation was wilful). Section 115 of the CRA amended that limitations period to permit suits within a window commencing sixty days after filing charges with the EEOC to ninety days after receiving a right to sue letter. If the amended limitations period in § 115 controls, then the plaintiffs' claims are barred. If the three year period applies, the plaintiffs' claims are not barred.

The Supreme Court recently discussed the retroactivity issue in *Landgraf v. USI Film Products*, 114 S.Ct. 1483 (1994), holding that the provisions of the CRA creating the right to recover compensatory and punitive damages for certain violations of Title VII and for providing for

trial by jury if such damages are claimed, do not apply retroactively. However, the Court stated that "[c]hanges in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity." 114 S.Ct. at 1502. The Court reasoned that,

> [b]ecause rules of procedure regulate secondary rather than primary conduct, the fact that a new procedural rule was instituted after the conduct giving rise to the suit does not make application of the rule at trial retroactive.

The Court noted that procedural rules do not apply to every pending case; rather, the Court stated that, "[o]ur orders approving amendments to federal procedural rules reflect the common-sense notion that the applicability of such provisions ordinarily depends on the posture of the particular case." 114 S.Ct. at 1502 n. 29. These statements are consistent with precedent in this circuit in *In re Resolution Trust Corp.*, 888 F.2d 57 (8th Cir. 1989), and this court in *Sudtelgte v. Sessions*, 789 F.Supp. 312, 314 (W.D. Mo. 1992), that the appropriate way in which to consider retroactivity issues is to distinguish between procedural and substantive provisions in the statute. The question in this case then becomes whether the ADEA statute of limitations is procedural or substantive in nature.

Every court that has addressed and analyzed this issue has held that the limitations period in § 115 of the CRA is procedural in nature and accordingly applies to cases which arose prior to November 21, 1991, but were not filed until after November 21, 1991. *Rich v. Zeneca, Inc.*, 845 F.Supp. 162 (D. Del. 1994); *Smith v. Zeneca, Inc.*, 820 F.Supp. 831 (D. Del. 1993); *Hartig v. Safelite Glass*

Corp., 819 F.Supp. 1523 (D. Kan. 1993); *McConnell v. Thomson Newspapers, Inc.*, 802 F.Supp. 1484 (E.D. Tex. 1992). The rule in several circuits is that statutes of limitation are considered to be procedural rather than substantive, and therefore are generally accorded retroactive effect. *FDIC v. Belli*, 981 F.2d 838, 842 (5th Cir. 1993); *Banas v. American Airlines*, 969 F.2d 477, 485 (7th Cir. 1992); *Federal Deposit Insurance Corp. v. New Hampshire Ins. Co.*, 953 F.2d 478, 487 (9th Cir. 1991); The Supreme Court has opined that,

> [t]he historical record shows conclusively, we think, that the society which adopted the Constitution did not regard statutes of limitation as substantive provisions, akin to the rules governing the validity and effect of contracts, but rather as procedural restrictions fashioned by each jurisdiction for its own courts.

Sun Oil Co. v. Wortman, 486 U.S. 717, 726 (1988). The Court reasoned that at the time the Constitution was adopted, the view was that a statute of limitations did not "extinguish the underlying right but merely causes the remedy to be withheld." *Id.* at 725. This historical reading of statutes of limitations is in accord with the cases that there have held that statutes of limitation are considered to be procedural rather than substantive. *See Banas*, 969 F.2d at 485.

The plaintiffs argue that under the procedural/substantive test outlined in *Sarfati v. Wood Holly Assoc.*, 874 F.2d 1523 (11th Cir. 1989), § 115 of the CRA is substantive in nature and therefore does not apply retroactively. In *Sarfati*, the court stated that

> [a] statute of limitations that restricts a right created by statute rather than a right at common law generally is deemed to be a substantive limit on the right as opposed to a mere procedural limit on the remedy. In other words, the limitations period is an integral part of the right itself and is a condition on whether the right may be exercised . . . a limitations period that is an integral part of the right will not be retroactively applied to cover causes of action already in existence, unless the legislature manifests such an intent.

Id. at 1525-6 (citations omitted). The court held that in order for a limitations period to be considered a substantive limit on a right, the limitations period must be contained in the same statute or act;

> [t]hus if a right created by statute is in one act and the limitations period is in another act, then the limitations period is presumed not to be an integral part of the right itself. . . . The limitations period is said to be only a procedural limit on the remedy, and not a substantive limit on the right. In these instances, courts have held that an enactment of or amendment to such a limitations period generally would be applied to causes of action that previously accrued but were still viable.

Id. (citations omitted). The plaintiffs argue that in this case § 115, the new ninety-day limitations period, and the section creating an age discrimination action, § 101, are contained within the same act, the Civil Rights Act of 1991. Therefore, argue the plaintiffs, because the applicable statute of limitations is now contained within the same Act which provides the substantive rights under *Sarfati* the limitations period is substantive and has no retroactive effect.

The court disagrees.[1] The fact that the limitations period is now within the same statute does not automatically transform the limitations period into an integral part of the substantive right itself. The court must look at several factors in a situation such as this, the two most important being the original role of the limitations period in the creation of the substantive right, and Congress' reason for the amendment. As the plaintiff concedes, the limitations period was originally borrowed from the Portal-to-Portal Pay Act and therefore was not an "integral part of the right itself". *Sarfati,* 874 F.2d at 1526. Thus, under *Sarfati,* the substantive right created by the statute

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[1] The court's research has revealed *Simmons v. Al Smith Buick., Co.,* 841 F.Supp. 168 (E.D. N.C. 1993), a case decided after briefing had concluded in this case, in which the court held that the ninety day limitations period is not the only limitations period in ADEA cases, but that the two year limitations period from the Fair Labor Standards Act, 29 U.S.C. § 216 (adopting the limitations period from the Portal-to-Portal Pay Act, 29 U.S.C. § 255), also applies. The practical effect of the court's holding is that if a plaintiff has failed to file within the ninety day limitations period, a plaintiff may still file suit within two years of the alleged discriminatory act. This court disagrees with the holding of the *Simmons* court for two reasons. First, Congress amended the ADEA to specifically exclude any reference to § 255. Second, the legislative history of § 115 reflects Congress' intent to eliminate the two year statute of limitations for initiating litigation.

> [i]n addition, to avoid future confusions, this section eliminates the ADEA's dual limitations scheme for filing charges and initiating litigation, replacing it with the single 2-year charge-filing requirement that Section 205 proposes for Title VII.

H.R. Report No. 40(I), 102nd Cong., 1st Sess. 96 (1991), *reported in* 1991 U.S.C.C.A.N. 549, 634. The court does not find the *Simmons* decision persuasive and declines to follow it.

did not include the limitations period. The limitations period was therefore only a procedural limit on the remedy, not a substantive limit on the right. According to the precise language of *Sarfati*, amendment to such a limitations period is retroactive to cases previously accrued but still viable. In addition, the legislative history of the amended limitations period, § 115 of the CRA, reflects that Congress intended to make the ADEA limitations period more consistent with Title VII to avoid confusion which the previous differences had created. H.R. Report No. 40(I), 102nd Cong., 1st Sess. 96 (1991), *reported in* 1991 U.S.C.C.A.N. 549, 634-5. Nothing in the legislative history contains any mention of the amended limitations period taking on the characteristic of being "a condition on whether the [substantive] right may be exercised." *Sarfati*, 874 F.2d at 1526. Both factors signify that the amended limitations period is simply a change in the procedural mechanism within which to seek a remedy, not a change in the substantive right. The fact that now the limitations period is within the act and not borrowed from the Portal-to-Portal Pay Act is a distinction without a difference. To find on that basis alone that § 115 is a substantive provision ignores the role of the limitations period in the creation of the ADEA's substantive rights and Congress' reasons for amending the limitations period. Accordingly, the court holds that the amended limitations period contained in § 115 of the CRA is procedural in nature and retroactively applies to cases which accrued prior to November 21, 1991, but were not filed until after that date.[2]

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[2] This holding as applied to this case is consistent with the Supreme Court's statements in *Landgraf* that Courts should exercise common-sense in applying procedural rules retroactively and that such application depends on the posture of the

The plaintiffs next argue that even if § 115 is retroactive, the defendants have waived, or are equitably estopped from asserting, the statute of limitations argument by choosing to enter into dismissals without prejudice on the original timely filed actions. These arguments are meritless.

A dismissal without prejudice of a suit timely filed under the ADEA does not act to toll the statute of limitations period of the statute. *Jones v. Frank*, 819 F.Supp. 923 (D. Colo. 1993); *Enos v. Kaiser Industries Corp.*, 443 F.Supp. 798 (D. D.C. 1978). The plaintiffs, however, assert that the defendants have waived their right to assert a statute of limitations defense under the following rule:

> Where the conduct of parties is so consistent with and indicative of an intention to relinquish a particular defense or right, and so clear and unequivocal that no other reasonable explanation of the conduct is possible, waiver will be found.

(Suggestions in Opposition at 13, citing *Medicare Glaser Corp. v. Guardian Photo, Inc.*, 936 F.2d 1016 (8th Cir. 1991)). The only conduct plaintiffs cite is defendants' act of

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particular case. 114 S.Ct. at 1502, n. 29. In this case the EEOC did not issue right to sue letters to the plaintiffs until after November 21, 1991. Therefore, the plaintiffs, had the benefit of the full ninety-days in which to file suit. In addition, the EEOC's right to sue letters specifically advised the plaintiffs to file suit **"within two years of the date of the alleged discrimination and within 90 days of the receipt of this letter, *whichever is earlier.*"** (Defendant's Exhibit 2) (emphasis in original). This letter clearly put the plaintiffs on notice that failure to file their action within both limitations periods could produce a statute of limitations problem.

entering into a stipulation for dismissal without prejudice. On the basis of that act alone, the plaintiffs contend that the defendants forever waived any right to assert a statute of limitations defense. This conduct alone is insufficient to meet the *Medicare Glaser* standard for waiver. Had the defendants expressly agreed that the plaintiffs' rights to refile the lawsuits would be preserved indefinitely, or for a definite period, then the plaintiffs would have a strong argument for waiver. However, no evidence of an express agreement exists.

The plaintiffs finally argue that the court should equitably toll the statute of limitations because the defendants are equitably estopped from raising the statute of limitations defense. Equitable estoppel may prevent a defendant from asserting a statute of limitations defense "if the defendant takes active steps to prevent the plaintiff from suing in time." *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 450 (7th Cir. 1990), *cert. denied*, 111 S.Ct. 2916 (1991); *Albert v. Thornton*, 735 F.Supp. 1443, 1462 (W.D. Mo. 1990), *aff'd., Nerman v. Alexander Grant & Co.*, 926 F.2d 717 (8th Cir. 1991). No evidence exists of any "active step" the defendants took to induce the plaintiffs to enter into the stipulations of dismissal, or otherwise prevent the plaintiffs from suing in time. Mere inquiry from defendants' counsel concerning intention to refile does not reasonably suggest that refiling would be timely – at most it suggests interest in whether there might be further legal "trouble" (which would include a controversy over timeliness, as in this case). The plaintiff's flawed subjective beliefs concerning the law or defendants' planned defense do not justify equitably tolling the statute of limitations.

Accordingly, for the reasons stated above, the court GRANTS the defendants' motion to dismiss the plaintiffs' complaints as time barred.[3] The Clerk of the Court is ORDERED to enter judgment for the defendants.

/s/ Howard F. Sachs
HOWARD F. SACHS
SENIOR DISTRICT JUDGE

Dated: May 27, 1994.

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[3] The plaintiffs do not dispute that their causes of action under the Missouri Human Rights Act are barred by that Act's ninety day limitations period. Therefore, for the reasons stated in the defendants' suggestions in support, the court will dismiss those claims as well.